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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GASTON GERALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED

1. Whether the Trial Court improperly restricted the voir dire examination of prospective jurors regarding the nature, source and intensity of pretrial publicity or other means whereby the said jurors obtained knowledge of this case and their ability to put aside any information so obtained to such an extent that defendant was denied sufficient information upon which to exercise intelligently the important trial right of peremptory challenges and the means by which to determine the existence of potential challenges for cause which were not disclosed by the cursory examination by the Trial Judge of the jurors on their voir dire with regard to the publicity or other means by which they obtained knowledge about this case?

2. Whether the Trial Court erred

when it refused to instruct the jury, in accordance with appellant's request, that a fear of economic loss is not included within a situation where there is only speculation that there will be an economic gain depending upon the success or failure of an unlawful bribery scheme?

3. Whether, when the trial judge after asking a witness if materials used in the construction of certain buildings had been obtained in interstate commerce and the witness affirmatively replied, and the trial judge then declared that the interstate commerce element had been satisfied by that evidence but the theory of the effect upon interstate commerce was the depletion of assets affecting future interstate commerce, the erroneous reliance upon the evidence of previous interstate commerce followed by a proper instruction that the Court determined the

legal question and the jury resolved only the issue of credibility of the evidence upon which the Court relied for its determination of an effect upon interstate commerce cured the initial error when the Court's initial determination, made immediately following the testimony about past interstate commerce, focused the jury's attention upon that evidence as the testimony to which their determination of credibility should be addressed?

4. Whether the contemporaneous objection requirement of Rule 30, F.R. Cr.P., may be applied to bar reversal of a conviction based upon jury instructions which, in violation of due process, changed the nature of the offense from attempting or aiding and abetting an attempted extortion to being an accessory after the fact of extortion?

I N D E X

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Gaston Gerald, respectfully prays that a writ of certiorari issue to review the judgment and

opinion of the United States Court of Appeals which was rendered on August 25, 1980, and entered on October 9, 1980, following the denial of a petition for rehearing and suggestion for rehearing en banc.

OPINIONS BELOW

The opinions of the Fifth Circuit Court of Appeals (Appendix A, p. A-1, et seq., infra) is reported at 624 F.2d 1291. Denial of rehearing occurred on October 9, 1980, as shown by the annexed Table Entry, Appendix B, infra, p. A-42, which is reported at 629 F.2d 1350.

There were no relevant written opinions of the United States District Court for the Middle District of Louisiana.

JURISDICTION

This is a criminal case in which

petitioner, a State Senator, was charged in a five-count indictment for conspiring to violate the Hobbs Act, 18 U.S.C., Section 1951. The Trial Court had jurisdiction under 18 U.S.C. 3231.

Petitioner was convicted and appealed to the Fifth Circuit Court of Appeals. That Court had jurisdiction under 28 U.S.C. 1291, 1294. On the appeal to the Court below, petitioner raised all issues presented herein.

On August 25, 1980, the Court below affirmed petitioner's conviction. 624 F.2d 1291 et seq., Appendix A, infra, p. A-1 et seq. A timely petition for rehearing was denied on Ocvtober 9, 1980. Appendix B, infra, p. A-42.

This Court has jurisdiction and petitioner respectfully invokes the jurisdiction of this Court vested in it by 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the Sixth Amendment, the interpretation of 18 U.S.C. 1951, Rules 24(a, b), 30, and 52(b), F.R.Cr.P. The text of those provisins is set forth below:

The Sixth Amendment, United States Constitution, in relevant part provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *.

Title 18, United States Code, Section 1951, in relevant part, provides:

> (a) Whoever, in any way or degree, obstructs, delays, or affects commerce or the movement of any article or commodity in commerce * * * by extortion, or attempts or conspires so to do, * * * [is gulty of violating the law and shall be punished according to the terms of the statute].
>
> (b) As used in this section--
>
> * * * * * *
>
> (2) The term "extortion" means

the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

* * * * * *

Rule 24, F.R.Cr.P., provides in relevant part:

(a) The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

* * * * * *

(b) If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges.

* * *

Rule 30, F.R.Cr.P., in relevant part, provides:

* * * No party may assign as error any portion of the charge

or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

Rule 52(b), F.R.Cr.P., provides:

(b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Louisiana Senator Gaston Gerald was charged in a five-count indictment with (1) conspiring with and/or aiding and abetting one Jack Menzie to extort Charles Carter & Co., Inc., through its president, Bob Carter, of the sum of $25,000.00, the consent of Bob Carter having allegedly been induced and obtained by the wrongful use of fear of economic loss and under color of official right (R. 1-8); (2) unlawfully attempting to affect and unlawfully affecting commerce through the same alleged extor-

tionate activity, or aiding and abetting Jack Menzie to do so (R. 9); and perjury before the grand jury when defendant testified (3) he did not know to whom certain money delivered to him was to go (R. 9-10); (4) he returned the money to Jack Menzie on or about February 9, 1978 (R. 11-12); and (5) he did not talk with City-Parish Councilman Earl Day about the issue of liquidated damages against Charles Carter & Co. which was then pending before the City-Parish Council.

The defendant filed a pre-trial motion for individual voir dire examination of the prospective jurors. The Government did not oppose that motion. The motion was referred to the Magistrate, who determined the motion to be premature and deferred ruling thereon until the trial.

After the submission of this cause

to the jury, the jury deliberated for eight hours and then asked whether defendant was charged in Count II with aiding and abetting. The Court gave the following instruction to the jury which purported to define aiding and abetting and advised the jury that defendant was in fact charged with aiding and abetting in Count II (Tr. 504):

> * * * in aiding and abetting, a person does not become part of the conspiracy. But if someone commits a crime, even without the knowledge of the defendant, but then if it comes to the knowledge of the defendant that a crime has been committed, and the defendant then, after the fact, does something to aid or abet the person, either in furtherance of the crime or--in furtherance of the commission of the crime, or in any part of the crime after the initial commitment, if he aids or abets a person in the commission of the crime, knowing then that the crime has been committed, then he is an aider or abettor, and can be charged the same as the principal. That's the difference between a conspiracy and aiding and abetting.

The jury returned a verdict of guilty on

Count II. The jury acquitted Senator Gerald of conspiracy to extort and all three counts of perjury. In view of the circumstances under which the verdict was returned in Count II, the only reasonable interpretation of the jury's verdict is that it convicted the defendant of aiding and abetting Jack Menzie's attempted extortion of Charles Carter & Co., Inc., by holding the money Jack Menzie had obtained from Bob Carter, playing upon Carter's fear of economic loss if liquidated damages were assessed against his company.

Upon the jury's verdict on Count II, the Trial Court sentenced defendant to serve five (5) years in the custody of the Attorney General.

STATEMENT OF FACTS

The Court below reviewed the sufficiency of the evidence and proclaimed

that, viewing the evidence in the light most favorable to the Government, it was sufficient to establish defendant's guilt of the offense charged in Count II. While we respectfully disagree that the Government is entitled to all the Court read into this case, the issues presented by this petition do not deal with the sufficiency of the evidence and, for the sake of brevity, petitioner refers this Court to the comprehensive statement of facts which is set forth in Appendix A to this Petition. The facts important to this Petition relate to the conduct of the voir dire examination of the jurors in this case, the controversy whether, at most, this was a bribery case or a Hobbs Act extortion, the Court's determination of interstate commerce on the basis of an uncharged theory which was inapplicable to the case, and the Court's instructions

which changed the nature of the offense from aiding and abetting an attempted extortion to being an acessory after the fact of extortion.

At the outset of the trial, the jurors were examined on their voir dire. The Court asked the jurors generally, en masse, about their residence, employment, spouses' employment and then summarized the charges made against Senator Gerald. (Tr. 9-11) The Court then inquired if any persons on the panel knew anything about this case. Specifically, the Court asked (Tr. 11):

> Now, are there any members of the jury who know anything about this case? There has been publicity in this case, as we all know, in the newspapers; it was reported in the news media from time to time, and I ask you how many of you have read or heard any of the news media anything in connection with this matter?

Sixteen members of the panel as it was then composed acknowledged they had heard

about the case. (Tr. 27) The Court commenced to inquire whether any of the jurors who had heard anything about the case had formed a fixed opinion, but when Juror Babin stood to address the Court, after obtaining the juror's name, the Court directed him to be seated. (Tr. 11-12) The Court then advised the jurors of the presumption of innocence and the effect of the defendant's plea of not guilty, then returned to the issue of pre-trial publicity, saying (Tr. 12-13):

> Now, going back to the question of the publicity or the news coverage of this event. There is no requirement under the law that you cannot serve as a juror simply because you have heard or read of the offense involved; the only prohibition to service is that you could not act as an impartial, unbiased and fair juror; and that you could not judge the case on the law and evidence that is produced before you during the course of the trial. It does not exclude you from being a juror simply because you presently have an opinion; but you can be or may be excluded as a juror if that opinion is so fixed that you could not change it if the law and the

> evidence produced before you during the course of the trial indicated that you should.

Juror Babin maintained after such instructions that he could not give the defendant a fair trial. The Court excused him. (Tr. 13) The Court then called prospective juror Monroe and asked him generally whether his answers to the questions previously asked of the other members of the panel would be the same. The Court asked him if he had read or heard anything about the case. He had, but had not "followed it to any extent." He had no fixed opinion in the case. It was his conclusion that nothing he had read or heard about the case would affect his ability to act as a fair and impartial juror in this case. (Tr. 14-15) The Court did not call upon the other members of the panel of prospective jurors to even answer the questions put to

prospective jurors Babin or Monroe. The Court continued with the general voir dire, not asking anything else about the source of the information possessed by the jury, the intensity of the circulation of that information, or anything else which would assist the defense to evaluate the desirability of any particular juror because of possible latent biases resulting from the publicity. (Tr. 16-24)

The Court then instructed counsel to commence striking jurors. (Tr. 25) At that time, the following proceedings were had (Tr. 25-26):

> MR. MC PHERSON: Your Honor?
>
> THE COURT: Yes.
>
> MR. MC PHERSON: Could I request that the jurors who by a show of hands indicated that they had read or heard about this case that they be interrogated in greater detail to determine whether they arrived at any factual conclusions about the case?

THE COURT: Well, I asked them that. Are there any members of the jury who have heard anything about this case? Have you arrived at any factual conclusions in the case that could not be changed by the presentation of evidence to the contrary?

All right. The Court makes its own individual finding at this time that these twenty-eight persons are qualified to serve as jurors and that they, in fact, do constitute twenty-eight persons without bias or prejudice in connection with this case.

Please make your strikes and hand them to the Bailiff.

Defense counsel objected to the Court's findings made solely upon the basis of the prospective jurors' conclusions about their own abilities to be impartial and unbiased without knowledge of what particular facts or information was known to the prospective jurors. (Tr. 26) Counsel asked the Court to ascertain, for the record, the number of prospective jurors who had heard or read anything about this case. Of the twenty-eight prospective

jurors from whom counsel were to select a jury, fifteen (15) of them had been exposed to knowledge about this case from some source which was neither disclosed nor about which were they asked any questions to enable counsel to make a determination that they were not affected by such publicity, perhaps unknown to them or otherwise not evoked by the limited voir dire conducted by the Court. In addition to the fifteen jurors who had been among the members of the panel at that time, Juror Babin also acknowledged that he had been exposed to the publicity. Thus, a total of sixteen of the twenty-nine prospective jurors who were interrogated by the Court admitted their prior exposure to the publicity which the Trial Court acknowledged had appeared in the newspapers and had been reported by the news media "from time to time." As a

final gesture to satisfy defense counsel's request for additional information, the Court once again asked (Tr. 27):

> Asking those people once again, ladies and gentlemen, are there any of you who have just raised your hand, who have any opinion--have formed any opinion of any kind as to the guilt or innocence of the defendant or as to the truth or falsity of any of the things that you have read about?

The cursory inquiries made by the Court, which were completely unrevealing about the nature or the information possessed by the prospective jurors or the objective basis for any conclusions of the lack of bias or prejudice by the jurors, was all defense counsel had to go on in exercising the defense's peremptory challenges. With no response to the last quoted question posed by the Court, the Court ordered the parties to commence striking the jurors. (Tr. 27)

Defense counsel used only eight of

the ten allotted peremptory challenges.

After the jury had been selected and sworn, when it was too late to do anything about it with regard at least to the exercise of peremptory challenges, the Court admonished the jurors about their duties to decide the case based solely on the evidence presented and asked if what they had heard or read might impair their ability to act impartially. Also at that time, after the jury had been selected and had left the Courtroom to use the telephone to advise their families of their selection as jurors, the Court purported to give defense counsel an opportunity to expand upon his objection to the proceedings about which he had previously objected. Realizing that the jury had already been empaneled and sworn and that his opportunity to ascertain information useful to

the exercise of peremptory challenges had already passed and knowing of no disqualification on the part of any juror which would result in that juror being removed from the panel, defense counsel stated "that it serves no useful function to argue the motion at this point." (Tr. 32)

The evidence showed that Mr. Robert Carter made efforts to get the City-Parish Council in Baton Rouge, Louisiana, to waive the liquidated damages clause of his contract with the local government to build two public buildings. Such efforts preceeded any involvement with petitioner regarding Jack Menzie's apparent attempt to take advantage of a bribe attempt which had been made by others who backed away when Mr. Carter said he was going to talk to the F.B.I. about what was going on. Menzie never

revealed to petitioner how he became involved or any of the conversations with Carter. The evidence shows no attempt by petitioner to extort Carter. At most, there is the mere offer to accept a bribe to use his personal influence with the City-Parish Council to get them to waive the forfeited damages for late completion of the construction. It was the defense' position that the alleged victim, Carter, hoped to obtain a financial gain by bribery rather than that he was forced to give up his money because of an extortion, attempted or otherwise. The defense sought to have the Court instruct the jury that fear of economic loss could not be equated with a hope for illegal gain, hence if the jury found that there was mere bribery by Carter then there was no extortion or attempted extortion by petitioner or Menzie. The Court refused

such an instruction.

The theory of an effect upon interstate commerce which was presented by the Government was the depletion of assets with which to secure other items in commerce. The Court interrogated the prosecuting witness about the materials used in the construction of the buildings which had been completed before any alleged extortionate attempt. When the witness declared that he had obtained materials for the construction of the buildings in interstate commerce, the Court declared that the interstate commerce element had been satisfied. This was not the theory charged, as exemplified by the bill of particulars. That theory of interstate commerce could not have been legitimately charged because the construction was completed before there was any attempted extortion by

anyone. The Court below, despite the Trial Court's declaration, looked to other evidence which would support the charge which was actually made. The jury, however, was obviously impressed that the credibility it was to determine was Carter's credibility about the use of materials obtained in interstate commerce with which to construct the buildings. The theory upon which the Court instructed the jury was different from that found by the appellate court. The Trial Court's actions influenced the jury to convict petitioner upon an uncharged and untried theory of prosecution.

The jury was obviously confused about the nature of the charges made against petitioner. It returned to the Courtroom and requested additional instructions about whether petitioner was charged in Count II with aiding and

abetting. Rather than merely answering the jury in the affirmative or re-reading its former instructions on aiding and abetting, the Court below improvised, trying to draw a distinction between a conspiracy and aiding and abetting. Instead, however, the Court distinguished between conspiracy and being an accessory after the fact, equating the latter with aiding and abetting. The Court in its final charges only minutes before the verdict was reached on Count II, changed the nature of the offense with which petitioner was charged and permitted the jury to convict upon an uncharged offense. See the quoted charge, ante, p. x of the Statement of the Case. The defense made no objection to the Court's instructions which changed the theory of the case. The Court below held that the plain error rule could not be applied

when the rights affected involved the jury charge and there was no contemporaneous objection.

REASONS FOR ALLOWING THE WRIT

THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW IN A MANNER WHICH CONFLICTS WITH APPLICABLE DECISIONS OF OTHER PANELS OF THE FIFTH CIRCUIT AND WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS CONSTRUING THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY AND THE FEDERAL RULES OF CRIMINAL PROCEDURE IMPLEMENTING THAT RIGHT.

By a pretrial motion filed at the time of other pretrial motions, the defense moved the Court to grant individual voir dire examination of the jurors on the authority of United States v. Davis, 583 F.2d 190 (5 Cir. 1979). That motion was referred to the Magistrate, who held it to be premature and ruled that the decision would be postponed until trial. The Government did not object to the motion for individual voir dire. Defense

counsel never supplemented that motion with the specific news articles which were published in the newspapers nor with transcripts of the numerous radio and television broadcasts which saturated the Middle District of Louisiana because it felt that the Government's lack of objection to the procedure, combined with the Court's own knowledge of the publicity, would result in searching inquiry into the jurors' knowledge of the case, their preconceived notions about the case and the objective data on which the Court could ascertain whether the jurors, or any one of them, should be challenged either for cause or peremptorily. The Trial Judge, however, did not go along with this requested procedure despite the Government's lack of objection to it and the Court's knowledge of the extensive publicity this case received.

While the Panel in this case noted that "[t]he voir dire as to prejudicial publicity in the instant case is similar to the procedure condemned in Davis in that it arguably allows each juror to decide whether pretrial publicity exposure has contaminated his or her ability to render an impartial verdict," it found a "critical difference between the circumstances in Davis and the circumstances present here" (Slip op., p. 8860):

> * * * In Davis there was extensive evidence in the record of potentially prejudicial pretrial publicity. This evidence enabled the court to conclude that "[u]nder the circumstances of . . . [Davis] where the nature of the publicity as a whole raised a significant possibility of prejudice, the cursory questioning by the court was not enough." (United States v. Davis, supra) at 196. However, the record in the instant case is completely devoid of indicators of the nature or extent of pretrial publicity except for the unrevealing statement of the trial court to the venire:
>
> There has been publicity on this case, as we all know, in the

> newspaper; it was reported in the news media from time to time.

That, however, was not the only indicator of the "extent" of the publicity. Of the twenty-nine veniremen who were interrogated on voir dire about the publicity in this case, sixteen of them had some knowledge of the case, the nature or extent of which knowledge was never ascertained because of the Trial Court's restriction of voir dire to questions generally asked the jurors en masse, seeking the juror's personal, subjective evaluation of their own abilities to be fair and impartial.

The Court below concededly would have had a more substantial basis for holding that this case is exactly like Davis if defense counsel had anticipated that the Trial Court would not grant his unopposed request for individual voir dire examinations of the jurors and had,

accordingly, included the news items in the record. However, in adversarial proceedings in which one's opponent does not object to a fair procedure, it seems hardly necessary to support the entitlement to that procedure. There are enough points of contention between the parties in a criminal case without wasting the valuable time of counsel and the resources of the defendant in marshaling evidence to support an unopposed procedure. When the Trial Court refused to go along, it was too late then to obtain this data.

We submit that the failure to include the numerous news items in the record should not be fatal. There is no assurance that the means by which the prospective jurors obtained their knowledge was through the news media, as heavy as its coverage therein was. The

primary question posed to the prospective jurors was, "Now, are there any members of the jury who know anything about this case?" The Court then qualified it by making reference to newspapers, news media and anything else as the sources of their information. When the fifteen members then on the panel raised their hands, there was no way to tell by what means any particular one of them had learned about this case. What if there had been absolutely no news coverage of this case but the jurors had congregated at Court and, upon learning that a State Senator was to be tried possibly before them, engaged in lengthy discussions by at least half of the summoned number about what some or each of them had heard or knew about the case? Should such a claim of inadequate voir dire be defeated because the defendant did not produce the

non-existent pretrial publicity? When the Court inquires whether the jurors have heard anything about the case, it should be incumbent upon the Court to explore that knowledge and not simply call upon the jurors to make the personal determination whether they can set aside whatever it is they have found out and try the case fairly and impartially. We do not suggest or deny that the source of the jurors' knowledge in this case was dissimilar to the example cited above. Because of the cursory examination of the jurors on their voir dire which was provided by the Court below, we do not know the source of knowledge of any of the prospective jurors concerning this case. The fact that more than half of them had some knowledge of the case is indisputable. The production of news articles would be relevant, and perhaps necessary,

in determining whether the Court should ask "content" questions. Accord, United States v. Johnson, 584 F.2d 148 (6 Cir. 1978), p. 156 nn. 17-18 and accompanying text. No such interrogation was sought by counsel in this case. Counsel sought to have the jurors "interrogated in greater detail to determine whether they arrived at any factual conclusions about the case." Rather than interrogating the jurors in any detail, the Court asked the jurors point-blank whether any of the members who had heard anything about the case had "arrived at any factual conclusions that could not be changed by the presentation of evidence to the contrary." In the manner the question was asked, defense counsel did not even find out which jurors, if any, had formed any conclusions of fact, whether or not they believed they could put those conclusions

out of their mind and fairly try this case. The jurors' silence, which indicated a negative response, was totally unilluminating about the existence of any factual conclusions or the source of those conclusions. The general inquiries made by the Court in this case were simply inadequate for counsel to benefit in the exercise of peremptory strikes. We submit that the jurors' conclusions about their own abilities, without any objective basis being provided the Court, were meaningless utterances upon which the Court was not entitled to rely in assessing the qualifications of the jurors. The Court's adoption of these statements without evidential foundation was arbitrary and capricious and denied the defendant a fair jury selection process. Voir dire examination must be sufficiently comprehensive for the Court to

determine the jurors' qualifications. The jurors' conclusions about their qualifications is inadequate for the Court to perform its duty to make the independent determination that the jurors were qualified.

This case, however, does not depend upon the inadequacy of the factual basis of the Court's pronouncement that the jurors were fair and impartial for a proper determination that the judgment below should be reversed. There is an equally compelling reason for determining that the voir dire was inadequate to enable the defendant to protect himself against prejudice resulting from the inadequate voir dire examination of the prospective jurors.

The opinion below, pp. 8859-61, cites numerous cases which have dealt with the sufficiency of voir dire exami-

nation in cases where there has been pretrial publicity of varying degrees. All of those cases, however, discuss the adequacy of voir dire examinations to elicit challenges for cause or to determine the jurors' legal qualifications to serve on the jury. Language in many of the cited cases, however, supports the position of defendant rather than that of the Panel. The constricted view of the Panel below, occasioned by looking to cases dealing with the adequacy of voir dire to elicit legal grounds for challenge, does not provide the defendant his full right of voir dire and the limitations upon the inquiry disabled him from effectively utilizing his peremptory challenges.

As stated in 2 WRIGHT, Federal Practice & Procedure, Criminal Section 384, pp. 42-43 (1969):

> The use of peremptory challenges has a long history, going back to common law. Although it has been held that there is no constitutional requirement that peremptory challenges be permitted (Stilson v. United States, 1919, 250 U.S. 583, 586), the Supreme Court says that such challenges are "one of the most important rights secured to the accused" (Pointer v. United States, 1894, 151 U.S. 396, 408; see ABA Project on Minimal Standards for Criminal Justice, Trial by Jury, Tent.Dr. 1978, p. 71), and "a necessary part of trial by jury" (Swain v. Alabama, 1965, 380 U.S. 202, 219).

Voir dire, as a predicate to peremptory challenges, is a vital element of the trial process. Brundage v. United States, 365 F.2d 616 (10 Cir. 1966); United States v. Napoleone, 349 F.2d 350 (3 Cir. 1965). The right to exercise peremptory challenges is so important that its inhibition is prejudicial error without the necessity of showing actual prejudice. United States v. Allsup, 566 F.2d 68 (9 Cir. 1977); United States v.

Rucker, 577 F.2d 1046 (4 Cir. 1977; United States v. Harris, 542 F.2d 1283 (7 Cir. 1976), cert. den., 430 U.S. 934 (1977). See, also, United States v. Sams, 470 F.2d 751, 755, (5 Cir. 1972). Restricting voir dire to the point where peremptory challenges cannot be intelligently exercised is such an inhibition. United States v. Johnson, 584 F.2d 148, 155 (6 Cir. 1978); United States v. Shavers, 615 F.2d 266 (5 Cir. 1980).

In United States v. Mutchler, 559 F.2d 955, 958-960 (5 Cir. 1977), the Court dealt with a situation where a jury was selected nine days prior to the defendant's trial, during which nine-day interval the jurors served on other juries, some of which trials involved similar issues, the same government attorneys and witnesses. In that case, the Fifth Circuit made the following observation

about the role of peremptory challenges in the jury scheme enshrined in the Sixth Amendment to the Constitution (559 F.2d at 959):

> * * * Whether or not the judge's collective questioning could have been sufficient as regards challenges for cause, peremptory challenges represent an assumption in our adversary system that a party and his advocate can frequently discern bias in a prospective juror that cannot be extracted from his mouth in so many words. A juror who honestly swears to his impartiality may still be rightfully [peremptorily] challenged. The vice of the process employed below is that it forces counsel to act on information that must necessarily be obsolete by the time of trial.

At least counsel there had some information, and not just the jurors' personal opinions about their own impartiality, to utilize in exercising his peremptory challenges. In the instant case, all that was known by defense counsel was which jurors had heard anything about this case. What, how much, how often,

from whom--none of these questions were asked to give defense counsel the slightest basis for exercising the allotted challenges against the greater number of persons possessing some undisclosed information about this case.

The Court below found it "noteworthy" that defendant did not use all ten of his allotted challenges. (Slip op., p. 8858) The failure to exhaust peremptory challenges does not preclude a finding of reversible error based upon the inadequacy of the voir dire examination. United States v. Dellinger, 472 F.2d 340 (7 Cir. 1972), cert. den., 410 U.S. 970 (1973). We respectfully submit that the inadequacy of the voir dire disabled defense counsel from intelligently exercising his peremptory challenges.

The purpose of voir dire is not only

to elicit grounds for challenges for cause. A co-equal purpose is to provide the defense with adequate information to intelligently exercise the allotted peremptory challenges. United States v. Barnes, 604 F.2d 121 (2 Cir. 1979); United States v. Segal, 534 F.2d 578 (3 Cir. 1976); United States v. Rucker, 557 F.2d 1046 (4 Cir. 1977); United States v. Mutchler, supra (5 Cir.); United States v. Johnson, supra (6 Cir.); United States v. Jackson, 542 F.2d 403 (7 Cir. 1976); Silverthorne v. United States, 400 F.2d 627 (9 Cir. 1968); United States v. Haldeman, 181 U.S. App.D.C. 254, 559 F.2d 31 (1976), cert. den., 431 U.S. 933 (1977).

In United States v. Johnson, supra, 584 F.2d at 155, the Court said:

> We have previously noted that the "essential function of voir dire is to allow for the impaneling of a fair, and impartial jury through questions which permit the

> intelligent excercise of challenges by counsel." * * * A trial court commits reversible error if, by unduly restricting voir dire, it substantially impairs the peremptory challenge right. * * * Where veniremen have been exposed to prejudicial publicity the nature and degree of that exposure is certainly a matter of legitimate concern to a defense attorney in deciding on peremptory challenges.
>
> The peremptory challenge right is limited, however, by the need for expedition and orderly procedure in criminal cases. Under the federal rules, the trial judge is given broad discretion in conduct of the voir dire. * * * Although this discretion is limited by the "essential demands of fairness," * * * trial courts can ordinarily restrict voir dire to the questioning of veniremen on the sources and intensity of exposure and the juror's ability to disregard the publicity in reaching a verdict. * * * (Citations omitted.)

The voir dire by the Court in this case produced information only with regard to whom of the panel had exposure to the facts of the case. It did not meet the minimal allowable inquiry with regard to the "sources and intensity of exposure

and the juror's ability to disregard the publicity in reaching a verdict." No inquiry was made with regard to the former two; the Court sought only the jurors' personal conclusions about their own abilities with regard to the latter. This was clearly inadequate to enable defense counsel to intelligently exercise his peremptory challenges, even though it conceivably might have been adequate to allow the Court to determine the juror's qualifications. Cf. United States v. Mutchler, supra. The absence of at least this minimal information virtually disabled defense counsel from exercising all of the available challenges.

The Court's exercise of discretion in the control of the voir dire was subject to the demands of fairness. Aldridge v. United States, 283 U.S. 308, 310 (1931); United States v. Delval, 600

F.2d 1098, 1102 (5 Cir. 1979); United States v. Morgan, 562 F.2d 1001 (5 Cir. 1977), cert. den., 434 U.S. 1050 (1978); United States v. McDowell, 539 F.2d 435 (5 Cir. 1976); United States v. Rucker, supra. We submit the trial court was unfair to the defendant when it refused any inquiry into "specific details" about the jurors' knowledge of this case and forced defense counsel to flounder in ignorance while exercising his peremptory challenges. Such unfairness resulted in an unfair jury selection process which denied the defendant substantial rights guaranteed by Rule 24(b) of the Federal Rules of Criminal Procedure and recognized by this Court, in Swain v. Alabama, supra, to antedate the Federal Bill of Rights and to be a necessary ingredient of trial by jury under the Constitution. The Court below abused its discretion

under Rule 24(a), F.R.Cr.P., when it restrited the voir dire examination of the jurors to such an extent that petitioner could not effectively and intelligently exercise his substantial right to challenge jurors peremptorily.

THE COURT BELOW HAS SANCTIONED SUCH A FAR DEPARTURE FROM THE ORDINARY COURSE OF JUDICIAL PROCEEDINGS THAT THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION TO CORRECT THE ERRONEOUS JUDGMENT SO OBTAINED.

One of the theories of the defense was that this was a bribery rather than an extortion case because the owner of the company whose assets were allegedly depleted had forfeited the amount of money set aside for liquidated damages by virtue of the contract provisions relative thereto. The contract provided that such monies were forfeit but that the

City-Parish Council could waive such forfeiture by a majority of the members of the Council. It was contended that the said owner hoped, through a bribery effort, to obtain an unlawful economic gain and had no reason to fear an economic loss which, in law, he had already suffered by virtue of his noncompliance with the terms of the construction contract. The Court charged the jury in accordance with the statutory definition of "extortion" under 18 U.S.C. 1951(b)-(2). The defense requested the Court to instruct the jury (Tr. 489):

> * * * I would request that the Court instruct the jury that this does not include the hope of an economic gain. Before you can lose something, you have to be entitled to it, and not lose an anticipated or hoped for gain.

The Court did not so instruct the jury.

The Fifth Circuit has acknowledged

that proof of a bribery scheme will not suffice to sustain a conviction for extortion brought under 18 U.S.C. 1951. United States v. Duhon, 565 F.2d 345, 351 (5 Cir.), cert. den., 435 U.S. 952 (1978); United States v. Hyde, 448 F.2d 815, 833 (5 Cir. 1971), cert. den., 404 U.S. 1058 (1972). The requested instruction would have aided the jury to make a distinction between bribery and extortion. It would have been made clear to the jurors that an effort by the alleged victim, through bribery, to avoid the consequences of his failure to comply with the contract, viz., the assessment of liquidated damages, would not have been an extortion but a bribery, hence not conduct within the scope of the charges made. Even if the City-Parish Council would have voted to waive the

assessment of liquidated damages, a fear of such a loss is so highly speculative that it cannot reasonably have been believed by the jury that there was a fear of economic loss, other than that which was occasioned by the hope for illegal gain.

It is a fundamental principle of criminal jurisprudence in the Courts of the United States that the Court must instruct the jury in accordance with any theory of defense for which there is any evidence. There was substantial evidence of a bribery effort by the alleged victim, whether feigned for the purpose of entrapping petitioner and Jack Menzie or whether real. The Fifth Circuit has appropriately noted, in Perez v. United States, 297 F.2d 12, 15-16 (5 Cir. 1961):

> It is elementary law that the defendant in a criminal case is entitled to have presented

> instructions relating to a theory of defense for which there is any foundation in the evidence. * * * A charge is erroneous which ignores a claimed defense with such a foundation. * * * The charge to which he is entitled, upon proper request, in such circumstances is one which precisely and specifically, rather than merely generally or abstractly, points to his theory of defense * * * and one which does not unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory. * * * [Citations omitted.]

The instructions given by the Court in this case, deemphasizing the defense's theory of the case by refusing to instruct the jury thereupon, virtually denied the petitioner a valid defense to the charges made against him. This was fundamental error, the sanction of which by the Court below calls for this Court to exercise its supervisory jurisdiction and set aside the judgment below.

> THE COURT BELOW HAS SO FAR SANCTIONED A DEPARTURE FROM THE NORMS OF CRIMINAL JUSTICE IN

THE UNITED STATES THAT THIS COURT'S SUPERVISORY JURISDICTION SHOULD BE INVOKED TO CORRECT THE MANIFEST ERROR.

The indictment, as modified by a bill of particulars, charged that the effect upon interstate commerce was the depletion of the assets of Charles Carter & Company and the inability of the company to engage in future interstate commerce. The evidence summarized by the Court referred to a phase of the activities which occurred and was completed before petitioner or Jack Menzie ever became involved. The Court summarized the evidence on interstate commerce as follows (Tr. 456):

> * * * The evidence in this case, you will recall, was to the effect that Carter Construction Company purchased some of its building materials from outside Louisiana, and that they were shipped or transported into this state from other states. As you will recall, that was the answer of Mr. Carter to a direct question, and

> to my knowledge, there was no contrary evidence to that, but that will be for you to decide.

The Court then charged the jury that if it believed that Carter Construction Company did get some building materials from other states which it used in this state, then, as a matter of law, the interstate commerce element was proved. (Tr. 457)

The "depletion of assets" theory of prosecution relates to creating an effect upon interstate commerce by depriving the enterprise of funds with which to purchase goods in interstate commerce in the future. Therefore, it could not relate to the purchase of goods which went into the construction of the buildings which had already been completed at the time of the alleged extortion. By permitting the jury to convict on the basis that inter-

state commerce was affected by the alleged extortion on the basis of the purchase of materials with which to construct the buildings, the Court permitted the jury to convict on a theory of the case which was in direct contradiction to the Bill of Particulars and the issues joined by the plea and trial. That violated the petitioner's right to due process, as construed by the Court in Cole v. Arkansas, 333 U.S. 196, 201 (1948), in which this Court said it is as much a violation of due process to convict a man on a charge upon which he was never tried as it would be to convict him upon a charge that was never made. The charge upon which the Court directed the jury to find the existence of the interstate commerce element was never made or tried. Petitioner's conviction therefore vio-

lates due process and this Court should act to correct it and reverse the judgment below.

THE JUDGMENT OF THE COURT BELOW ALSO SANCTIONED A GROSS DEPARTURE FROM THE NORMS OF CRIMINAL JUSTICE AS TO REQUIRE A NEW TRIAL WHEN IT INSTRUCTED THE JURY THAT THE DEFENDANT COULD BE FOUND GUILTY UPON CHARGES WHICH WERE NEVER MADE IN THE INDICTMENT.

Only a few minutes before the jury reached a verdict, it sent a note to the Court asking whether petitioner was charged in Count II with aiding and abetting. The Court, rather than simply answering the jury that petitioner was so charged, purported to instruct the jury on the difference between aiding and abetting and the offense of conspiracy. The instruction given, which is quoted in the Statement of the Case, ante, defined the offense of being an accessory after

the fact. See 18 U.S.C. 3. That was not charged. These instructions of the Court also changed the nature of the charge against the petitioner and violated due process, as construed in Cole v. Arkansas, supra.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari and, after a full hearing upon briefs and the record below, this Court should reverse the judgment below and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James A. McPherson, Attorney of record for petitioner Gaston Gerald and a Member of the Bar of the Supreme Court of the United States, certify that I have served a copy of the foregoing Petition for a Writ of Certiorari upon the Solicitor General of the United States by mailing a copy of same to him at his official address this ____ day of December, 1980.

All parties required to be served have been served.

JAMES A. MC PHERSON
Attorney at Law

APPENDIX A

UNITED STATES of America,

Plaintiff-Appellee,

vs.

Gaston GERALD,

Defendant-Appellant.

NO. 79-5566

United States Court of Appeals,
Fifth Circuit

August 25, 1980.

Appeal from the United States District Court for the Middle District of Louisiana

Before GODBOLD, SIMPSON and THOMAS A. CLARK, Circuit Judges.

SIMPSON, Circuit Judge:

Appellant Gaston Gerald, a Louisiana State Senator, was indicted in the district court under charges of conspiracy, aiding and abetting attempted extortion, attempted extortion, and perjury. The jury returned a verdict of guilty on count II on the indictment which charged Gerald as a principal or an aider and abettor in an attempted extortion. He was acquitted of the remaining four counts. In this appeal Gerald argues: that the trial court voir dire of the pretrial publicity issue was reversibly inadequate; that the evidence was insufficient to support the jury verdict; that the trial court committed reversible error in certain jury instructions; that counts I and II of the indictment charging conspiracy and attempted extortion

were multiplicitous; and that the prosecutor exceeded the bounds of permissible cross-examination of a defense character witness. We find no meritorious ground for reversal and affirm.

FACTS

Taking the view most favorable to the Government, Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), there is evidence in the record from which the following facts could be found.

Charles Carter Construction Company, a large general contracting firm located in Baton Rouge, Louisiana, constructed two large public buildings in Baton Rouge under contract with East Baton Rouge Parish. The construction was not completed by the date specified in the contract because of various complications.

Consequently, Charles Carter, the prime mover behind the company began to hear rumors that the City-Parish Council, the legislative body for East Baton Rouge Parish, intended to enforce a late charge provision of the contract by assessing Carter $137,000. Under the terms of the contract the Council, by a vote of at least seven of the twelve members, had authority to assess late charges and to withhold that amount from final payment.

Several persons sought to capitalize on Carter's vulnerable position before the Council. One or more Councilmen and at least one appointed official informed Carter that the late charge would be assessed unless he paid them $25,000 to fix the vote of the Council. Carter told one member of the Council that he was considering bringing the matter to the

attention of the F.B.I. Quite understandably these extortion attempts halted. Indeed, the City-Parish personnel director, Sid Lacy, who had previously propositioned Carter, would not even return Carter's telephone calls.

But there were others who perceived an opportunity for gain in Carter's dilemma with the Council. Carter informed Jack Menzie of the Lacy offer and Menzie relayed the information to appellant. At the January 11, 1978 Council meeting there were six votes in favor of assessment, one less than needed to carry the assessment. The issue was continued until the next scheduled meeting. On January 14 Carter contacted the F.B.I. and agreed to assist in apprehending the extortionists. Meanwhile Menzie and appellant Gerald met and agreed to pick

up Lacy's earlier "deal." Menzie informed Carter that Lacy could not be trusted and that he, Menzie had an "acquaintance" who would procure a favorable Council vote for the same figure, $25,000. Carter agreed and gave Menzie $15,000 in earnest money for transmittal to the acquaintance. The money was to be returned if a favorable vote was not obtained. Menzie delivered the money directly to appellant. Sometime between the first Council vote and the second Council vote Gerald persuaded one Council member to change his vote to Carter's favor. But another member of the Council changed his former favorable vote causing the vote to deadlock for the second time at the January 25 meeting.

On February 3, 1978 appellant had lunch with Carter. Their conversation

was covertly recorded by a body recorder that Carter was wearing. The record reveals the following conversation.

Carter informed Gerald that he had given $15,000 to Menzie for the acquaintance to fix the Council vote but Menzie had not informed him of the identity of the acquaintance. Gerald replied: that he had done everything he could to help by talking with the mayor, a councilman and several others; that Carter should go "all out" to get the assessment waived at the next Council meeting; and that Menzie could be trusted. Gerald intimated that some members of the Council were seeking $75,000 for a favorable vote and that therefore the $25,000 deal proposed by Menzie and acquaintance was a bargain.

Nevertheless at the February 8, 1978 meeting the Council voted to assess the

full $137,000 in late charges. Pursuant to the money back guarantee Menzie retrieved the $15,000 from Gerald and returned it to Carter.

The F.B.I. subsequently contacted Menzie, obtained his agreement to cooperate and fitted him with a body recorder. The next taped conversation of Gerald took place outside the Senate Chamber of the Louisiana Legislature. After Menzie informed Gerald that the government was interested in the envelope containing Carter's $15,000, the following conversation ensued:

GERALD:

* * * Let's make sure that we're right * * * on our stories.

* * * * * * * * *

GERALD:

Uh, * * * you called me one day and told me you could get me $25,000. You were going to bring

something. No, you were going to bring something to see if I could get. * * * Tell me now, so we can make sure I get my story straight.

* * * * * * * * *

GERALD:

Uh, who was it. * * * Let me ask you this * * * there was somebody else talked about. * * * Bob said he was supposed to meet somebody else * * * or somebody approached Bob.

MENZIE:

It's Sid Lacy. Bob told me Sid Lacy approached him to start with.

* * * * * * * * *

MENZIE:

Drew [Menzie's attorney] tells me that * * * that * * * that * * * ya know. * * * I got to go up there before that grand jury and tell them the truth.

GERALD:

What does that mean?

* * * * * * * * *

MENZIE:

> Well, ya know. * * * I told you. * * * I never did tell him your name. I never did tell him where the money was going to go. That * * * ya know * * * and I didn't look.

GERALD:

> Yeah, but he knew then.

Government Exhibit 14.

PRETRIAL PUBLICITY

Appellant filed a written pretrial motion for an individual voir dire of the veniremen concerning allegedly prejudicial pretrial publicity. The magistrate ruled that the motion was premature and that decision would be postponed until trial. The trial began August 13, 1979, some six months after the motion for individual voir dire was heard by the magistrate and some eight months after the indictment was filed. The voir dire was conducted in open court in the pre-

sence of all jurors. The first statement made by the district judge and the only portion of the record that gives the slightest indication of the amount of the pretrial publicity follows:

> Now, are there any members of the jury who know anything about this case? There has been publicity on this case, as we all know, in the newspapers; it was reported in the news media from time to time, and I ask you how many of you have read or heard on any of the news media anything in connection with this matter?

Record vol. 2 at 11. A show of hands indicated that approximately one half of the prospective jurors had some prior knowledge of the case. Upon further questioning by the trial court one prospective juror indicated that he had formed an opinion as to Gerald's guilt and that he did not feel he could give Gerald a fair trial. He was excused. A replacement stated that he had read of

the case but had not formed any opinion as to Gerald's guilt and that he could act impartially.

Immediately before counsel were allowed to exercise peremptory challenges Gerald's counsel requested that the veniremen who previously indicated prior knowledge of the case "be interrogated in greater detail to determine whether they arrived at any factual conclusions about the case." Record vol. 2 at 26. The Court responded by asking the veniremen en masse whether any who had heard of the case had arrived at any factual conclusion that could not be changed by presentation of evidence to the contrary. No one indicated that he or she had arrived at such a conclusion. At the request of Gerald's counsel a second show of hands revealed that fifteen of the

twenty-eight veniremen had either heard or read of the case. Following the show of hands the court further inquired whether any of the prospective jurors had formed any opinion of the guilt or innocence of Senator Gerald or of the truth or falsity of the statements they had read concerning the case. No one responded. Finally peremptory challenges were exercised. It is noteworthy that Gerald's counsel only used eight of his ten allotted challenges.

The District Judge addressed further questions to the twelve empaneled jurors. He admonished them that their decision must be based on the evidence presented in court without regard to statements they may have heard from the newspapers or other outside sources. Again he asked if what they had heard or read might

impair their ability to act impartially. After the jury left the courtroom, the district judge gave Gerald's counsel an opportunity to expand upon a naked objection interposed during the voir dire of the veniremen. Gerald's counsel requested that his requested voir dire be made a part of the record; the request was granted.[1] Defense counsel at this point stated "that it serves no useful function to argue the motion at this point." Record vol. 2 at 32. In-

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1. However, we do not consider the requested voir dire because it can not be found in the record before us. It is appellant's responsibility to insure the inclusion in the record of al matters he intends to rely upon on appeal. Fed.R.App.P. 10(e) & 11(e); 9 J. Moore, Moore's Federal Practice Sections 210.03, 211.05. There is no indication before us as to why the requested voir dire is not in the record. Even if it were present it would not affect our decision in this appeal.

deed, the only clue as to the substance of the objection is a minute entry of the district judge stating that "[d]efendant's counsel objects to the jury on the grounds of pretrial publicity." Record vol. 1 at 171.

Appellant's objections to the voir dire and pretrial publicity are much more detailed before this court than before the district court. He now argues that the lower court committed reversible error by failing to conduct a probing inquiry of the specific pretrial publicity information each venireman had received and the specific impact the information might have had upon each. He further argues that the examination of each prospective juror should preferably have been conducted out of the presence of other jurors. Finally, appellant

asserts that in propounding general questions as to the jurors' ability to be impartial the district judge violated the teachings of United States v. Davis, 583 F.2d 190 (5th Cir. 1979) by delegating to each prospective juror the decision whether exposure to pretrial publicity impaired impartiality.

Rule 24(a) of the Federal Rules of Criminal Procedure gives the trial court broad discretion in deciding the scope and method of the jury voir dire. See, e.g., Ham v. South Carolina, 409 U.S. 524, 527, 93 S.Ct. 848, 851, 35 L.Ed.2d 46 (1973); United States v. Delval, 600 F.2d 1098, 1102 (5th Cir. 1979). The court's discretion extends to the decision whether to propound questions submitted by counsel and to the decision of whether jurors should be questioned col-

lectively or individually out of the presence of other jurors. United States v. Shavers, 615 F.2d 266, 268 (5th Cir. 1980); United States v. Delval, supra, 600 F.2d at 1102. Of course the trial court's discretion in this area is limited by the demands of due process. Specifically, a criminal defendant is entitled to an impartial jury which will render a verdict based exclusively upon the evidence presented in court and not on outside sources. Irvin v. Dowd, 366 U.S. 717, 722-23, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751, 756 (1961); United States v. Davis, supra, 583 F.2d at 197. A juror need not be totally ignorant of the case, but he must be able to decide the case exclusively on the evidence presented in court. Id.

In harmonizing the trial court's

broad discretion in the conduct of the jury voir dire with the due process requirement that the jury be impartial, an appellate court must independently evaluate the voir dire testimony of the empaneled jurors, see Irvin v. Dowd, supra, 366 U.S. at 723, 81 S.Ct. at 1643, 6 L.Ed.2d at 756, and decide whether there is a "reasonable assurance that prejudice would be discovered if present." United States v. Delval, supra, 600 F.2d at 1102, quoting, United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976). The trial court's decision will "not be lightly overturned." United States v. Carroll, 582 F.2d 942, 946 (5th Cir. 1978)(and cases cited therein).

United States v. Davis, supra, surveyed the boundaries of a trial court's discretion when conducting voir dire

under juror exposure to potentially prejudicial pretrial publicity. There we stated that because a juror is in a poor position to assess his own ability to be impartial after exposure to pretrial publicity, the trial court must independently decide the impartiality issue. One acceptable method of reaching the decision involves a three step process: (1) The court asks what specific information the prospective jurors have received. (2) Then the court inquires concerning the prejudicial effect of the information. (3) Finally, the court makes an independent determination of whether the information tainted the juror's impartiality. Id. at 197; United States v. Hyde, 448 F.2d 815, 848 n. 38 (5th Cir. 1971), cert. den., 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745

(1972). This procedure is contrasted to the sometimes unacceptable procedure of asking the veniremen point-blank whether the exposure to pretrial publicity affected their impartiality. Id.; Cf. United States v. Williams, 568 F.2d 464, 471 (5th Cir. 1978)(involving publicity during trial). Davis points out that although individual voir dire out of the presence of other jurors is not always required it is generally the preferred method. United States v. Davis, supra, 583 F.2d at 196-97 n. 8, 9.

The voir dire as to pretrial publicity in the instant case is similar to the procedure condemned in Davis in that it arguably allows each juror to decide whether pretrial publicity exposure has contaminated his or her ability to render an impartial verdict. However, there is

a critical difference between the circumstances in Davis and the circumstances present here. In Davis there was extensive evidence in the record of potentially prejudicial pretrial publicity. This evidence enabled this court to conclude that "[u]nder the circumstances of * * * [Davis] where the nature of the publicity as a whole raised a significant possibility of prejudice, the cursory questioning by the court was not enough." Id. at 196. However, the record in the instant case is completely devoid of indicators of the nature or extent of pretrial publicity except for the unrevealing statement of the trial court to the venire:

> There has been publicity on this case, as we all know, in the newspaper; it was reported in the news media from time to time. * * *

Record vol. 2 at 11.

Appellant invites this court to infer from the above statement of the trial court that "the nature of the publicity as a whole raised a significant possibility of prejudice * * * [and that therefore] the cursory questioning by the court was not enough." United States v. Davis, supra, 583 F.2d at 196. If the inference were made then we would likely conclude that the trial court committed reversible error in not following Davis. However, because of the lack of evidence as to the nature of the pretrial publicity, we decline to accept appellant's invitation. There is simply no record basis for the required inference.

United States v. Davis, supra, held that in factual situations where the nature of certain pretrial publicity

creates a "significant possibility of prejudice" a trial court commits reversible error by permitting the jurors to decide whether their ability to render an impartial verdict is impaired by exposure to the publicity. Id. at 196. In United States v. Hyde, supra, a case involving juror exposure to publicity during trial,[2] this court expressed disapproval of the trial judge's questions to the jury concerning the effects of the publicity because the questions allowed the jurors to decide the impartiality issue. Id. at 848 n. 38 (cited with approval in United States v. Davis, supra). However

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2. Pretrial and trial publicity do not involve identical circumstances and considerations, but the court's responsibility to determine impartiality of jurors is the same for both situations. United States v. Davis, supra, 583 F.2d at 197 n. 10.

Hyde's conviction was not reversed because the publicity was not prejudicial. Id. We conclude that the same result obtains when the record before this court lacks a foundation from which we may conclude that the nature of the publicity created a significant possibility of prejudice. See United Staes v. Davis, supra, 583 F.2d at 196.

Appellant asks us to infer too much from the trial judge's cryptic acknowledgement that the case had received publicity prior to trial. Certainly some of the voir dire questions did allow the veniremen to assess their own impartiality. However, we refuse to reverse on that ground because appellant failed to provide evidentiary support for his general allegations of prejudicial pretrial publicity. Cf. United States v. Pom-

ponio, 563 F.2d 659, 665 (4th Cir. 1977), cert. den., 435 U.S. 942, 98 S.Ct. 1521, 55 L.Ed.2d 538 (holding that where no specific news items are brought to the attention of the trial court general questions, addressed to the entire venire requiring each venireman to assess his ability to render a just verdict exclusively on evidence in court, are sufficient). A defense counsel must direct the trial court's attention to specific news items so the trial court can make an initial determination of whether the information is prejudicial. Id. For purpose of appeal, the defense counsel must see that the record reflects the nature and extent of the publicity so that the appellate court may also initially determine whether the publicity was prejudicial before determining

whether the voir dire demands of United States v. Davis, supra, were met in the trial court. See note 1, supra. The time consuming, probing, preferably individual voir dire described in Davis generally is not required in cases involving unsupported general allegations of prejudicial pretrial publicity or in cases where the publicity does not create a significant potential of prejudice. Accord, Salemme v. Ristaino, 587 F.2d 81, 88 (1st Cir. 1978); United States v. Pomponio, supra, 563 F.2d at 665; United States v. Johnson, 584 F.2d 148, 156 (6th Cir. 1978), cert. den., 440 U.S. 918, 99 S.Ct. 1240, 59 L.Ed.2d 469 (holding that in the absence of a "clear foundation for inquiry into juror recollection of particular prejudicial matter" the trial judge correctly refused to ask questions

concerning content of articles jurors may have read); United States v. Giese, 597 F.2d 1170, 1183 (9th Cir. 1979), cert. den., 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (holding that in cases where pretrial publicity is not great a defendant's right to an impartial jury is adequately preserved by general questions addressed to the entire venire followed by individual questioning of jurors who respond affirmatively); United States v. Evans, 542 F.2d 805, 812-13 (10th Cir. 1976), cert. den., 429 U.S. 1101, 97 S.Ct. 1124, 51 L.Ed.2d 550 (holding that a trial court does not abuse its discretion by failing to conduct an individual voir dire and refusing to ask questions propounded by the defense if no specific incident of prejudicial publicity is cited).

The record does not show prejudice[3]

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3. Several factors suggest that the jury was impartial. Impressions and memories of whatever publicity existed had a chance to grow faint because of the lapse of approximately eight months between arraignment and trial. See United States v. Capo, 595 F.2d 1086 (5th Cir. 1979), cert. den., 444 U.S. 1012, 100 S.Ct. 660, 62 L.Ed.2d 641 (trial began one year after the offenses occurred). Only fifteen of twenty-eight prospective jurors had heard anything about the case. See United States v. Giese, supra (only one half had heard of the case). Compare United States v. Davis, supra (every member of the venire had heard of the case).

There are even indicators that the defense did not consider the panel to be prejudiced by the alleged publicity. Only eight of a posssible ten peremptory challenges were used. See United States v. Evans, supra, 542 F.2d at 813. There was no motion for change of venue or to dismiss the jury.

Next, we think it revealing that there was no evidence of publicity in the record and that objections in the trial below were skeletal. As stated above, the objection to the voir dire was vague and the district judge's attention was not directed to the pending motion for individual voir

and "[w]e refuse to [find] prejudice where none has been revealed." Brown v. United States, 403 F.2d 489, 491 (5th Cir. 1968).

SUFFICIENCY OF THE EVIDENCE

Gerald argues that the district judge should have granted his motion for judgment of acquittal based upon alleged insufficiency of the evidence. The theory upon which the government tried the case was that Gerald (and Menzie) sought to induce a $25,000 payment from Carter

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dire filed seven months prior to trial. One would expect considerably more effort in the trial if the defense counsel believes the jury is prejudiced by pre-trial publicity.

Finally, the jury's acquittal of Gerald as to four of the five counts submitted suggests strongly that the verdict was reached upon an open and unprejudicial consideration of the evidence, and not otherwise.

by exploiting Carter's fear that he would lose $137,000 by a Council vote to assess a late charge. Appellant argues that the assessment money did not belong to Carter's company at the time of the extortion attempt because the Council had withheld ten percent of the total pursuant to the liquidated damages provision of the contract. Therefore, argues Gerald, Carter did not have a fear of economic loss as prohibited by the statute, he merely had a hope of an unlawful gain. This is an ingenious but meritless argument. The withheld money belonged to Carter's company even though it was not in his actual possession and even though the Council had the power to assess the penalty.

In the instant case the decisive question under 18 U.S.C. 1951 (the Hobbs

Act) is whether Gerald intended to cause Carter to pay the $25,000 by exploiting Carter's fear of economic loss. If not, then Gerald was only accepting a bribe, an offense not punishable under 18 U.S.C. 1951. United States v. Duhon, 565 F.2d 345, 351 (5th Cir. 1978), cert. den., 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed.2d 802; United States v. Hyde, supra, 448 F.2d at 833. The fear need not have been actually caused by Gerald; the statute is satisfied if Gerald intended to exploit the fear. Id.

We have discussed the standard an appellate court must apply when reviewing a denial of a motion for judgment of acquittal based on insufficiency of the evidence in United States v. Burns, 597 F.2d 939 (5th Cir. 1979). Applying this standard we conclude that the evidence

was sufficient for a reasonable jury to find, beyond a reasonable doubt, that Gerald either sought to induce the $25,000 payment by exploiting Carter's fear of economic loss or that Gerald aided and abetted Menzie in such an attempt. See United States v. Duhon, supra; United States v. Hyde, supra.

Appellant's remaining arguments are of questionable merit and therefore warrant only summary discussion. All but two are raised for the first time on this appeal. Rule 52(b) of the Federal Rules of Criminal Procedure permits appellate courts to notice alleged errors which were not brought to the attention of the trial court if they constitute "plain error." Plain error is error which is "both obvious and substantial". Sykes v.

United States, 373 F.2d 607, 612 (5th Cir. 1966), cert. den., 386 U.S. 977, 87 S.Ct. 1172, 18 L.Ed.2d 138. There is no hard and fast rule for determining whether error is plain; the determination turns upon the facts of a particular case. Id. The plain error rule is not a run-of-the-mill remedy. The intention of the rule is to serve the ends of justice; therefore it is invoked "only in exceptional circumstances [where necessary] to avoid a miscarriage of justice." Eaton v. United States, 389 F.2d 485, 486 (5th Cir. 1968), cert. den., 393 U.S. 937, 89 S.Ct. 299, 21 L.Ed.2d 273.

To establish extortion under 18 U.S.C. 1951 the government must prove the requisite effect on interstate commerce. The statute is violated if the defendant

attempts an extortion which, if successful, would "in any way or degree" obstruct, delay, or affect interstate commerce or the movement of any article or commodity in commerce. Id. This jurisdictional interstate commerce element generally does not place a large burden on the government because even a minimal effect on interstate commerce will sustain jurisdiction under the statute. See United States v. Summers, 598 F.2d 450 (5th Cir. 1979); United States v. Hyde, supra, 448 F.2d at 837.

Appellant belatedly objects to a mid-trial statement by the district judge and a portion of the jury charge, both concerning the interstate commerce issue. The government's trial theory was that Charles Carter and Company, Inc. is a large contracting firm involved in

interstate commerce and that the attempted extortion would potentially affect interstate commerce by depleting the assets of the company. The district judge asked witness Carter: "In the construction of that building, did you have materials that traveled in interstate commerce, materials that were purchased outside the state?" Record, vol. 2 at 68. After Carter responded affirmatively, the judge stated: "The Court finds as a fact that interest [sic] commerce was involved in the construction of the building in question." Id. at 69. Appellant argues this effect on interstate commerce occurred during the construction phase of the contract, but the extortion attempt occurred after construction was completed. Therefore, argues Gerald, the court's statement

allowed conviction (as to the interstate commerce issue) on a theory that was neither alleged nor sufficient under the statute.

The error, if present, is neither substantial nor obvious. Evidence abounds that the extortion attempt had at least a potential minimal effect on interstate commerce. The unchallenged evidence showed a company that was substantially involved in interstate commerce. Documentary evidence consisted of several contracts with subcontractors who were also involved in interstate commerce and invoices of material bought outside the state. Carter testified that he had numerous other projects involving interstate commerce, and that he continued in business up to the time of the trial. Although the district judge's

statement appeared to take the issue of the credibility of this evidence from the jury, the record reveals the opposite. At the end of the trial the district judge correctly charged the jury that if they believed the evidence presented on this issue then the interstate commerce element was satisfied. There is no miscarriage of justice requiring invocation of the plain error rule. See Eaton v. United States, supra.

Appellant raises similar objections to a portion of the jury charge concerning the interstate commerce issue. No objection was made at trial. Rule 30 of the Federal Rules of Criminal Procedure provides that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to

consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Id The plain error rule must not be used to eliminate rule 30. See Hattaway v. United States, 416 F.2d 1178, 1181 (5th Cir. 1969). In United States v. Freeman, 619 F.2d 1112 (5th Cir. 1980), a case involving alleged error in instructions to the jury we stated:

> The instruction on coconspirator declarations was not erroneous, and it clearly was not plain error because the charge is not "'so erroneous that when considered in the totality of the charge as a whole and the evidence presented against each appellant, the error is so great as to result in the likelihood of a grave miscarriage of justice.'" United States v. Franklin, 586 F.2d 560, 569 (5th Cir. 1978), cert. den., 440 U.S. 97, 99 S.Ct. 1536, 59 L.Ed.2d 789 (1979) [quoting United States v. Smith, 502 F.2d 1250, 1256 (5th Cir. 1974)]

The charge, when viewed as a whole instead of as isolated sentences, is

correct. See United States v. Roberts, 546 F.2d 596, 598 (5th Cir. 1977), cert. den., 431 U.S. 968, 97 S.Ct. 2927, 53 L.Ed.2d 1064. There clearly is no obvious and substantial error or a miscarriage of justice. See Eaton v. United States, supra; Sykes v. United States, supra.

Appellant also argues that the trial court committed plain error in charging the jury on aiding and abetting. Although there is one isolated portion of the instruction that is potentially misleading, the charge, viewed as a whole, is correct. See United States v. Freeman, supra; United States v. Roberts, supra. Any confusion was immediately rectified by a correct instruction on the law. There is no plain error.

Gerald's next contention, also

raised for the first time on appeal, is that he is entitled to reversal of his conviction because the trial court failed to require the government to elect between the allegedly multiplicitous Counts I and II. We need not reach the substance of this argument. Rule 12(b)(1) of the Federal Rules of Criminal Procedure provides that failure to raise objections to defects in the indictment before trial amounts to a waiver of the objection. There is no cause shown to warrant relief from the waiver. See Fed.R.Crim.P. 12(f). Cf. United States v. Freeman, supra, 619 F.2d at 1118 (objection that indictment lacked specificity required by the Sixth Amendment was waived by failure to object before trial).

Appellant's remaining two arguments

are without merit and require no discussion. The conviction is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35, F.R.A.P.; Local Fifth Circuit Rule 12)

Group 1--Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

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U.S. v. Gerald 79-5566

10/9/80 M.D.La., 624 F.2d 1291

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